United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-4203

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JULIA D. VICTORINO,

Petitioner,

-against-

Docket No. 75-4203

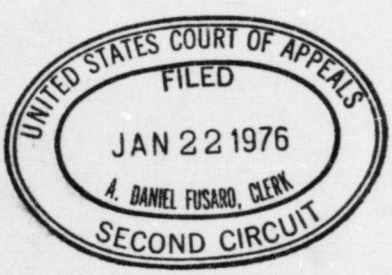
IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

B/P/S

PETITION TO REVIEW
A FINAL ORDER OF
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR PETITIONER



STEVEN S. MUKAMAL, Esq.
Counsel for Petitioner
Barst & Mukamal
127 John Street
New York, New York 10038
212 952-0700

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UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

JULIA D. VICTORINO,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the State Department's administrative denial of Petitioner's request for asylum and its subsequent prejudicial effect in deportation proceedings violated Petitioner's Fifth Amendment's guarantee of due process of law?

STATEMENT OF THE CASE

This petition has been brought to review a determination of the Immigration and Naturalization Service. Jurisdiction of this Court is invoked under 8 U.S.C. 1105(a).

On February 25, 1975, the Immigration Judge, following a denial of petitioner's application for a temporary withholding of deportation pursuant to 8 U.S.C. 1253(h), entered an order of deportation with a provision for voluntary departure against

Petitioner in this case.

The order of the Immigration Judge was affirmed by decision of the Board of Immigration Appeals dated and entered July 17, 1975. The instant petition for review was filed with this Court on September 22, 1975.

STATEMENT OF FACTS

Petitioner, Julia D. Victorino, is a native and citizen of the Republic of Philippines. She entered the United States as a non-immigrant visitor for pleasure at Seattle, Washington on May 1, 1970. At that time, Ms. Victorino was authorized to remain in the United States until December 15, 1970.

As a result of the fact that she overstayed her authority to remain in this country, Ms. Victorino came under deportation proceedings pursuant to 8 U.S.C. 1251(a)(2). An Order to Show Cause was issued by respondent, Immigration and Naturalization Service, and was duly served upon Petitioner.

Subsequently, Petitioner applied to the District Director of the Service for a grant of political asylum. Her request for asylum was forwarded by the District Director, in a letter dated December 27, 1973, to the Department of State's Office of Refugee and Migration Affairs.

In a letter dated March 29, 1974 the Office of Refugee and

Migration Affairs, acting solely on the information provided by the office of the District Director and without providing for petitioner's participation in its administrative determination, denied her application for asylum in the United States.

Subsequent to this action, a hearing was held before an Immigration Judge in the matter of Ms. Victorino's deporation on January 23, 1975 at the district office of the Service in New York, New York.

One month later, on February 25, 1975, the Immigration Judge rendered a decision granting Ms. Victorino the privilege of voluntary departure. As an alternative to voluntary departure, Ms. Victorino submitted a request for a temporary withholding of deporation pursuant to 8 U.S.C. 1253(h), on the grounds that she would be subject to persecution in the Philippines because of her political beliefs.

In order to establish her eligibility for relief under 8 U.S.C. 1253(h), Ms. Victorino gave sworn testimony and submitted public documents as to the present conditions in the Philippines and as to her fear over returning to that country.

In this same opinion, the Immigration Judge denied petitioner's request for a withholding of deportation.

The Board of Immigration Appeals affirmed the decision of the Immigration Judge on July 17, 1975.

It is from the denial of relief under 8U.S.C. 1253(h) and

other arbitrary and capricious acts of respondent that this petition for review has been brought.

SUMMARY OF ARGUMENT

Petitioner challenges the process by which the State Department determines eligibility for political asylum in the United States and the subsequent impact of this administrative determination in deportation proceedings.

It is petitioner's contention that the State Department's review and decision-making process denies her due process of law, insofar as she is precluded from (a) inquiring into the relevant facts considered by the State Department (b) examining State Department sources of information and (c) participating in an otherwise unknown administrative procedure which directly affects her ability to sustain the burden of proof pursuant to 8 U.S.C. 1253(h) and 8 C.F.R. 242.17(c).

Such action by respondent deprives petitioner of her Fifth Amendment guarantee of due process of law. Therefore, respondent's denial of petitioner's application for withholding of deportation pursuant to 8 U.S.C. 1253(h) should be reversed as being arbitrary and an abuse of discretionary authority.

POINT I

THE STATE DEPARTMENT'S ADMINISTRATIVE DENIAL OF PETITIONER'S REQUEST FOR POLITICAL ASYLUM VIOLATED HER FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW IN DEPORTATION PROCEEDINGS.

The procedure used by the Immigration Service in evaluating and passing upon requests for political asylum involves a two-step process whereby the District Director of the Service seeks a determination from the State Department on the bona fides of an alien's claim for political asylum.

A letter is sent to the State Department's Office of Migration and Refugee Affairs by the District Director and that office decides whether the alien has presented facts sufficient to establish a "well-founded fear" of persecution on account of race, religious affiliation or political opinion.

Having made such a determination, the Office of Refugee and Migration Affairs sends its conclusions to the District Director and this determination is made available to the Immigration Judge at the time he passes upon an alien's application for relief under 8 U.S.C. 1253(h).

The contents of these letters have been aptly described in Kasravi v. Immigration and Naturalization Service, 400 F.2d 675, 676, 677 (9th Civ. 1968), where the court, though deciding that

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The contents of these letters have been aptly described in Kasravi v. Immigration and Naturalization Service, 400 F.2d 675, 676, 677 (9th Civ. 1968), where the court, though deciding that

petitioner had failed to establish eligibility for relief under 8 U.S.C. 1254(a) and 8 U.S.C. 1253(h), stated:

> "The only evidence offered in opposition to Kasravi's petition is rather a (sic) perfunctory letter written by a State Department official concluding generally that an Iranian student would not all likelihood be persecuted for activities in the United States. Not only does this letter lack persuasiveness, but the competency of State Department letters in matters of this kind is highly questionable."

The Court went on to point out in a footnote to this statement that:

> "Such letters from the State Department do not carry the guarantees of reliability which the law demandsof admissible evidence. A frank, but official discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world. The traditional foundation required of expert testimony is lacking; nor can official position be said to supply an acceptable substitute. No hearing officer or court has the means to know the diplomatic necessities of the moment, in the light of which the statements must be weighed." supra at 677, footnote 1.

It is petitioner's contention that this attenuated process which denies her the opportunity to (a) inquire into all the relevant facts considered by the State Department, (b) examine State Department witnesses and/or information and (c) challenge

an otherwise unknown procedure, violates her right to procedural due process as guaranteed by the Fifth Amendment.[1]

It has long been established that an alien is a "person" entitled to the same protection of his life, liberty, and property under the Fifth Amendment as is afforded a citizen. Galvan v. Press, 347 U.S. 522 (1954) rehearing denied 348 U.S. 852; Holt v. Klosters Rederi A/S, 355 F. Supp. 354 (D.C. Mich. 1973); U.S. ex. rel. Mezei v. Shaughnessy, 195 F.2d 964 (2d Cir. 1952), reversed on other grounds 345 U.S. 206 (1953).

In attacking the State Department's evaluation procedure, Petitioner would point out that the subsequent effect of the agency determination procedure is often used by the Immigration Judge as a presumption against the alien. This, in effect,

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[1] Petitioner would distinguish the line of cases holding that the Attorney General or his delegate may base his opinion in withholding of deportation cases on evidence which is undisclosed to the alien. see United States ex rel. Dolentz v. Shaughnessy, 206 F.2d 392 (2d Cir. 1953) and Hosseinmardi v. Immigration and Naturalization Service, 405 F.2d 25 (9th Cir. 1968).

Petitioner here contends that the process by which the State Department determines eligibility for political asylum becomes of prejudical weight in deportation proceedings and, in the face of evidence to the contrary on the issue of political asylum creates a situation which lacks the necessary procedural due process and constitutes an abuse of discretion. Cf. Foti v. Immigration and Naturalization Service, 375 U.S. 217 (1963); Wong Wing Hang v. Immigration and Naturalization Service, 360 F.2d 715 (2d Cir. 1966).

establishes a double burden on the alien seeking the benefits of Section 243(h) of the Act.[2]

In view of the fact that Ms. Victorino was not permitted to participate in the State Department's determination of her application for political asylum, the use of this denial in the deportation proceeding increases the burden already placed upon the Petitioner by 8 C.F.R. 242.17(c) which provides in relevant part that:

> "The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion or political opinion as claimed."

Considering this burden in light of the discretionary power given to the Attorney General in the withholding of deportation under Section 243(h), the alien is presented with the almost insurmountable task of first refuting a prior administrative determination and then having to establish her own eligibility for a withholding of deportation on the basis of a "well-founded

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2 The instant case is distinguishable from Asghari v. Immigration and Naturalization Service, 396 F.2d 391 (9th Cir. 1968), wherein it was held that advice from the State Department was admissible in a deportation proceeding on the issue of relief under Section 243(h) of the Act. There only the issue of admissibility was considered, whereas here, petitioner questions the process by which the State Department's determination was made, the denial of due process inherent in that determination, and the subsequent prejudicial impact on the Immigration Judge in imposing a double burden on petitioner contrary to the intent of 8 C.F.R. 242.17 (c).

fear" of persecution. This double burden runs against the weight of authority holding that;

> "The fundamental principles controlling the deliberations and determination of the immigration officials and the Secretary ...are held, in an opinion of Mr. Justice Hughes, to be "the fundamental principles of justice embraced within the conception of due process of law."

Tang Tun v. Edsell, 223 U.S. 673,682 (1912), cited in Chun Kock Quon v. Proctor, 92 F.2d 326, 327 (9th Cir. 1937).

In one of the many Chinese exclusion cases, involving a claim of citizenship, which arose in the early part of this century, Justice Clark, speaking for a majority of the Supreme Court stated:

> "The Acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race." Kwock Jan Fat v. White, 253 U.S. 454, 464 (1920) (emphasis added)

Ms. Victorino is here faced with deportation to a country with a repressive government that has evidenced its willingness to resort to violence in the suppression of all opposition. In such a case, where the Attorney General's discretionary power is so greatly influenced by an associated administrative determination,

and that determination occurs in the absence of constitutionally mandated procedural due process, the petitioner should be granted the bare minimum of fairness and be permitted to appear before the State Department's Office of Refugee and Migration Affairs, examine their information, its sources, and the overall manner in which a potentially harmful determination is made on this issue. Cf. Goldberg v. Kelly, 397 U.S. 254 (1970); Radic v. Fullilove, 198 F. Supp. 162 (N.D. Calif. 1961).

In Radic v. Fullilove, supra at 164, a case involving the deportation of a Yugoslav seaman and his application for relief under Section 243(h) of the Act, the District Court held that the failure of the Service to allow the alien-plaintiff an opportunity to examine, attack or refute documents in the file which the Hearing Examiner considered in denying his application, was unfair and essentially a violation of the alien's due process rights.[3]

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[3] Milutin v. Bouchard, 299 F.2d 50 (3rd Cir. 1962) is to be distinguished from Radic on the basis of its holding that undisclosed information relied upon by the Regional Commissioner in denying withholding of deportation need not include a finding that a disclosure would prejudice the national security of the United States.

However, in a strong dissent, Judge Staley stated that the question of whether a stay of deportation might be withheld solely upon the basis of undisclosed information must be answered in the negative. He reasoned that the net result of allowing such a holding to stand would be to effectively block the Court's power to review the Attorney General's findings in cases involving an exercise of discretion based on undisclosed information. supra at 54.

In Radic, as in the instant case, a government agency arbitrarily drew a "cloak of secrecy around such evidence as is claimed to be contrary to plaintiff's (sic) contentions." at 165.

The State Department's determination, so blatantly prejudicial to Ms. Victorino, was reached without the necessary due process scrutiny normally accorded persons who have a substantial interest at stake.

As Judge Halbert stated in Radic at 165,

> "Under our form of Government, the right to a hearing embraces not only the right to present evidence in support of one's position, but also a reasonable opportunity to know the claims of the opposing party with the privilege of seeking to refute those claims." It can still be said that, "...the right to be heard and the right to contest opposing evidence are equal and co-existing rights, and both are essential to procedural due process." citing Morgan v. United States, 304 U.S. 1 (1937).

To hold that the State Department's adverse determination in Ms. Victorino's case was proper in the context of the prejudicial impact it had during the deportation proceeding below would be to deny her the "inexorable safeguard" of a fair hearing and the procedural due process explicitly guaranteed by the Fifth Amendment. Cf. St. Joseph Stockyards Co. v. United States, 298 U.S. 38 (1936), Morgan v. United States, supra at 15.

CONCLUSION

WHEREFORE, petitioner prays that her application for withholding of deportation pursuant to 8 U.S.C. 1253(h) be granted, OR

In the alternative, that this case be remanded to the Immigration and Naturalization Service with directions that the State Department's letter of March 29, 1974 be excluded from a reopened deportation proceeding, or that petitioner be permitted to participate in a meaningful and substantial manner in the administrative process which determines her eligibility for political asylum, so as to eliminate the deprivation of procedural due process which she has otherwise suffered.

Respectfully submitted,

Steven S Mukamal

STEVEN S. MUKAMAL
Counsel for Petitioner
Barst & Mukamal

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AFFIDAVIT OF SERVICE

CITY OF NEW YORK:
SS:
COUNTY OF NEW YORK:

HARRY POLATSEK, being duly sworn, deposes and says:

1. That I am over 18 years of age and that I am not a party to this action.

2. That I reside at 82 Schermerhorn, Brooklyn, New York 11201.

3. That on January 22, 1976, I did serve two copies of the brief and appendix for petitioner in the above-captioned matter upon the office of Thomas Cahill, U.S. Attorney for the Southern District of New York, located at 1 St. Andrew's Plaza, New York, New York, in the office of the Civil Clerk, located on the 5th floor at the aforementioned address.

Harry Polatsek
HARRY POLATSEK

Sworn to before me this
22nd day of January, 1976.

NOTARY PUBLIC

STEVEN S. MUKAMAL
Notary Public, State of New York
No. 03-3046550
Qualified in Nassau County
Commission Expires March 30, 1976